Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1067

JAMES S. PADOR,
Petitioner,

vs.

THE PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 18, 1978.

OPINIONS BELOW

Opinions were delivered in both the Ninth Circuit and the appellate division of the District Court of Guam. Neither opinion is reported. The opinion of the Ninth Circuit is hereto appended as Appendix A, while that of the district court is hereto appended as Appendix B. No opinion was rendered by the Superior Court of Guam.

JURISDICTION

The judgment of the Ninth Circuit was entered on October 18, 1978. A timely petition for rehearing in banc was denied on December 5, 1978, and this petition for certiorari is filed within 30 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant's due process right to be free from the government calling the jury's attention to his silence at the time of his arrest and after he received Miranda warnings is so basic to a fair trial that its infraction can never be treated as harmless.

2. Whether the way in which the Ninth Circuit has decided this case conflicts in principle with *Doyle v. Ohio*, 426 U.S. 610 (1976).

3. Whether the Ninth Circuit's holding "beyond a reasonable doubt, that under the circumstances of this case, the prosecutor's statement was harmless" is erroneous.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

48 U.S.C. § 1421b

"(e) No person shall be deprived of life, liberty, or property without due process of law.

". . . .

"(u) The following . . . amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the second sentence of section 1 of the fourteenth amendment . . . ."

U.S. Const. amend. XIV, § 1, sentence 2

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner was indicted in the Superior Court of Guam for "the offense of Murder in the First Degree, in that [he] did unlawfully, feloniously, wilfully, deliberately, [and] with premeditation kill a human being by gunshot . . . with malice aforethought."[1]

During the government's opening statement the prosecutor called the jury's attention to petitioner's silence at the time of his arrest and after he had received Miranda warnings:

> "The police found the address of Mr. Pador . . . and they went over to see Mr. Pador; to see what he had to contribute, what explanation he could make. The police went to the home of Mr. Pador. He admitted his identity. He made certain admissions under certain circumstances, which will be explained to you; as a result of which—and after being warned of his constitutional rights—remained silent. The police then placed him under arrest and took him to [the] Agana Lock-up."[2]

The government's opening statement was reinforced by the prosecutor's attempt to again call petitioner's silence at the time of his arrest and after he had received Miranda warnings to the jury's attention:

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[1]Indictment, Record at 21.
[2]Transcript at 21.

"Q What, if anything, did Pador say after being advised of his rights?

"MR. BROOKS: Objection, Your Honor.

"THE COURT: Sustained."[3]

"Q Did Pador say anything after you advised him?

"MR. BROOKS: Objection, Your Honor.

"THE COURT: Sustained."[4]

Petitioner took the stand and gave an exculpatory version of the facts:

"A Well it was—takes about maybe around a few seconds before I could recover from the punches that I got.

"Q And what did you do, sir?

"A And when I tried to get up, I look at them and they were still struggling with Miss Dewitt and that man was still struggling with each other.

"Q And what was your reaction?

"A Well I was very scared, and I started to run towards my car.

"Q What did you do there?

"A Well I get my gun, and in the car, and put it in my hips and rush back to the scene.

"Q What happened when you got back at the scene?

"A I stopped and shouted, 'Leave her alone'. And then as they—as they were struggling, I did not get any answer from any one of them; and I saw the man trying to stay close of the hold of Miss Dewitt.

"Q And what happened?

[3]Transcript at 174.

[4]Transcript at 182.

"A As she was trying to—trying that he punches Miss Dewitt, which causes her to get knock down.

"Q And then what happened?

"A And he tried to grab me. He was trying to grab the gun from me; and me myself I was trying to defend the gun from being taken away from me.

"Q And what happened?

"A And then we rolled—we fall down to the ground and roll several times, and rested while he was on the top of me. His one hand was on my—chocking me and the other one was holding my hand with the gun. We have been wrestling for quite some time, which is—was quite long time for me; and before the gun went off—after the gun went off, Miss Dewitt tried to pull the man by the head so that I could go—I could loose myself."[5]

"Q And you broke off and ran away, is this correct?

"A After I get up when I was knocked down, yes.

"Q And where did you go when you ran away?

"A To my car.

"Q For what purpose?

"A Well I was thinking that no way in the world could I be match with this man, which is of greater strength than me, but I get the gun for the purpose of scaring him.

"Q You got the gun for purposes of scaring him?

"A Yes, sir.

"Q And did you then return to this man with this gun?

"A Yes, sir.

[5]Transcript at 403-04.

"Q . . . You ran back to the man with the gun in your hands, is that right?

"A It is in my hips but I'm holding it.

"Q You were holding it?

"A Yes.

"Q And you pointed the gun at this man?

"A No.

"Q How are you going to frighten him?

"A Well it did not give me any chance to point anything. I just had the gun on my side.

"Q But you came back prepared with the gun, is that right?

"A Yeah, I was. I had the gun on my side.

"Q And the man grabbed your hand, is this correct?

"A Yeah, grab me by the shoulder.

"Q He grabbed your hand with the gun, is that right?

"A Pardon me?

"Q This man grabbed your hand that held the gun, is this right?

"A While we are down wrestling.

". . . .

"Q . . . This man grabbed your hand that held the gun, didn't he?

"A Yes. To try to squeeze off my hand and with the intention of getting the gun from me.

"Q How did you know what his intention was?

"A Well that is the—when he first approach me, he was trying to grab hold of the gun.

"Q Was he?

"A That is his intention.

"Q Did you state on direct examination that he grabbed your hand that held the gun?

"A While we are in the ground, he was—he grabbed my gun because when we are still standing, I tried to—

". . . .

"Q And you pulled the trigger while he was holding your hand, didn't you?

"A I did not even know that I pulled the trigger. It is during our course of the struggle that the gun exploded . . . ."[6]

"Q . . . When this gun exploded, what if any reaction did you see on the man?

"A Still we continue to wrestle; not much reaction from him.

"Q Now when you left this man the first time, you could have gotten in your car and driven away, couldn't you?

"A Yes.

"Q But you chose to return now with the gun, didn't you?

"A Yes.

"Q And you renewed the fight with this man, didn't you, while holding a gun?

"A I was trying to scare him off; that was my intention."[7]

Although petitioner moved for a mistrial on the ground that the prosecutor had made a constitutionally impermis-

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[6] Transcript at 408-10.

[7] Transcript at 419.

sible statement to the jury,[8] the motion was denied.[9] The jury returned a verdict of guilty of murder in the first degree,[10] and petitioner was sentenced to life imprisonment.[11]

The appellate division of the District Court of Guam held "that the prosecutor's reference to [petitioner's] silence was not intended to raise, nor did it raise, in the jury's mind a negative inference regarding the exercise of his Fifth Amendment Rights," and affirmed.[12] The Ninth Circuit affirmed, holding that "we are satisfied, beyond a reasonable doubt, that under the circumstances of this case, the prosecutor's statement was harmless."[13]

REASONS FOR GRANTING THE WRIT

1. WHETHER A DEFENDANT'S DUE PROCESS RIGHT TO BE FREE FROM THE GOVERNMENT CALLING THE JURY'S ATTENTION TO HIS SILENCE AT THE TIME OF HIS ARREST AND AFTER HE RECEIVED MIRANDA WARNINGS IS SO BASIC TO A FAIR TRIAL THAT ITS INFRACTION CAN NEVER BE TREATED AS HARMLESS IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

"We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process

[8]Motion for Mistrial, Record at 59.
[9]Transcript at 437.
[10]Verdict, Record at 75.
[11]Judgment, Record at 77.
[12]Appendix B.
[13]Appendix A.

Clause of the Fourteenth Amendment. *The State has not claimed that such use in the circumstances of this case might have been harmless error.* Accordingly, petitioners' convictions are reversed and their causes remanded to the state courts for further proceedings not inconsistent with this opinion"[14]

"[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . . ."[15]

"There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. Reversal is required, without regard to a showing of prejudice and without regard to the strength of the other evidence, if a coerced confession was used at the trial, or if defendant was denied the right to counsel, or if the judge was not impartial, or if the community in which defendant was tried has been exposed to publicity highly adverse to him, or if the jury was instructed on an unconstitutional presumption, or if there has been purposeful discrimination in the selection of grand and petit jurors.

"There had been reason to think that this rule of automatic reversal applied to all errors of constitutional dimension, but in 1967 the Supreme Court, in *Chapman v. State of California,* held that this was not the case. The Court there concluded that

> there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Fed-

[14]Doyle v. Ohio, 426 U.S. 610, 619-20 (1976) (footnote omitted) (emphasis added).
[15]Chapman v. California, 386 U.S. 18, 23 (1967) (footnote omitted).

eral Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

The specific holding of Chapman is that comment by a prosecutor or court on a defendant's failure to take the stand could, under some circumstances, be harmless, although in the particular case it was held not to have been. Subsequently the Court seems to have held that the admission of illegally-obtained evidence is subject to its new harmless error rule. *Whether denial of other constitutional rights will require automatic reversal or whether it is subject to the harmless error rule cannot be known until the Court passes on specific issue[s].*"[16]

2. THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF FLORIDA ON THE QUESTION OF WHETHER A DEFENDANT'S DUE PROCESS RIGHT TO BE FREE FROM THE GOVERNMENT CALLING THE JURY'S ATTENTION TO HIS SILENCE AT THE TIME OF HIS ARREST AND AFTER HE RECEIVED MIRANDA WARNINGS IS SO BASIC TO A FAIR TRIAL THAT ITS INFRACTION CAN NEVER BE TREATED AS HARMLESS.

"The First District Court of Appeal, in a 2-1 decision, has held that comments on petitioners' right to remain silent which were made during the closing remarks to a jury by a legal intern prosecuting these cases for the state 'bordered on error, but the trial court's instruction was enough to render the remarks as harmless.' 320 So.2d 855, 856. That decision con-

[16] 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 855 at 369-71 (footnotes omitted) (emphasis added).

flicts with our more recent decision in *Bennett v. State,* 316 So.2d 41 (Fla. 1975), where we held that any comment on an accused's exercise of his right to remain silent is reversible error, without regard to the harmless error doctrine."[17]

"During the course of the trial, defendant moved for a mistrial because an investigator-witness called by the State let it be known to the jury that defendant refused to sign a waiver of his Miranda rights under the Fifth Amendment to the United States Constitution. The Court denied the motion and subsequently instructed the jury to disregard that part of the testimony. Defendant says that the reference to his refusal to sign a waiver form was a violation of his privilege against self-incrimination granted under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

"In *Jones v. State,* 200 So.2d 574 (Fla.App.3d, 1967), the Court adopted the language in *Miranda,* holding in effect that any comment upon the defendant's standing mute, or refusing to testify, in the face of an accusation was fundamental error requiring a new trial. . . .

"The affirmance of the order of the trial judge denying the motion for mistrial [which is a part of the written record of the proceedings in the court under review, as distinguished from the report of the testimony] is in conflict with the holding of the Court in *Jones v. State, supra.* . . .

". . . .

"The first error of which defendant complains was of constitutional dimension and warrants reversal

[17] Shannon v. State, 335 So.2d 5 (Fla. 1976).

without consideration of the doctrine of harmless error. *Jones v. State, supra*"[18]

3. THE WAY IN WHICH THE NINTH CIRCUIT HAS DECIDED THIS CASE CONFLICTS IN PRINCIPLE WITH AN APPLICABLE DECISION OF THIS COURT.

"[T]he *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendmend rights, see *Michigan v. Tucker,* 417 U.S. 433, 443-444 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See *United States v. Hale, supra,* at 117. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. MR. JUSTICE WHITE, concurring in the judgment in *United States v. Hale, supra,* at 182-183, put it very well:

> '[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.'

"We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."[19]

[18]Bennett v. State, 316 So.2d 41, 41-44 (Fla. 1975).

4. THE NINTH CIRCUIT'S HOLDING "BEYOND A REASONABLE DOUBT, THAT UNDER THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S STATEMENT WAS HARMLESS" IS CLEARLY ERRONEOUS.

The Ninth Circuit has overlooked the fact that at the trial the question before the jury was not, Is petitioner guilty of murder in the first degree? but was, Of what kind and degree of criminal homicide, if any, is petitioner guilty, murder in the first or second degree or of voluntary or involuntary manslaughter? The evidence was obviously susceptible to any number of interpretations. The jury could have found petitioner guilty of murder in the first or second degree or of voluntary or involuntary manslaughter.

[19]Doyle v. Ohio, 426 U.S. 610, 617-19 (1976) (footnotes omitted).

Petitioner took the stand and gave an exculpatory version of the facts. He had no choice but to testify after the jury had been told that "he made certain admissions under certain circumstances, . . . as a result of which—and after being warned of his constitutional rights—remained silent."[20]

Harmless error? Beyond a reasonable doubt? How could the Ninth Circuit declare that in assessing the kind and degree of criminal homicide the jury was not affected by the government's opening statement? Can it be believed beyond a reasonable doubt that the statement did not affect the jury's judgment to such a degree, however slight, that the scale was tipped and at least to some significant extent petitioner's version of the homicide was discredited, resulting in a verdict of murder in the first instead of in the second degree? Surely the statement might have had just enough of an effect on the jury to cause them to step the verdict up from second to first degree murder.

And could not the jury have been confused by hearing that petitioner had remained silent and then hearing his exculpatory testimony? Certainly the jury easily could have been led to the conclusion that since petitioner had remained silent at the time of his arrest, his exculpatory version was a mere fabrication.

[20]Transcript at 21.

5. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT AS TO THE APPLICABILITY OF THE HARMLESS ERROR RULE IN A CASE JUST LIKE THE PRESENT ONE WHERE THE QUESTION BEFORE THE JURY WAS NOT, WAS DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE? BUT WAS, OF WHAT DEGREE OF CRIMINAL HOMICIDE, IF ANY, WAS DEFENDANT GUILTY?

"The key issue in the case was Reid's motive in slaying the victim; if the jury had accepted Reid's version of events, it could not have convicted him of first-degree murder. . . .

"Thus, we cannot say beyond a reasonable doubt that, absent the prosecutor's improper reference to Reid's earlier silence, the jury would have rejected Reid's version of the facts. . . . Accordingly, the error cannot be considered harmless."[21]

6. THE DECISION OF THE NINTH CIRCUIT PANEL IN THE PRESENT CASE CONFLICTS WITH THE DECISION OF A DIFFERENT NINTH CIRCUIT PANEL IN A RECENT CASE NOW PENDING BEFORE THIS COURT.

"Petitioner Douglas presents us with a single issue on this appeal. At trial, the state prosecutor called Douglas' arresting officer as a state witness. After substantial questioning, Trial Tr. at 154-159, the following colloquy took place between the prosecutor and the arresting officer.

[21]Reid v. Riddle, 550 F.2d 1003, 1004 (4th Cir. 1977).

"Q. Who arrested Mr. Douglas?

"A. I did.

"Q. Did he make any statements to you?

"A. No.

Prosecutor: That's all the questions I have.

"[Trial Tr. at 158-59.]

"Douglas argues that his constitutional rights were violated when the prosecutor introduced evidence concerning the petitioner's exercise of his fifth amendment right to remain silent.

". . . .

". . . Given the equivocal nature of much of the evidence presented at trial, and the rather unusual, perhaps even bizarre, events recounted by both the prosecution and the petitioner, we cannot say, as a matter of law, that the prosecutor's question was harmless, beyond a reasonable doubt. . . .

"Accordingly, we reverse the judgment of the district court . . . ."[22]

[22]Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3148 (U.S. Sept. 1, 1978) (No. 78-364). Petitioner's representation that this case is now pending before this Court is based on a search of United States Law Week through the issue of December 5, 1978, the last issue available in Guam as of this writing.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Agana, Guam,
December 20, 1978.

Respectfully submitted,

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(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 78-1570

The People of the Territory of Guam,
Plaintiff-Appellee,

vs.

James S. Pador,
Defendant-Appellant.

[Filed October 18, 1978]

Appeal from the District Court of the
Territory of Guam

MEMORANDUM

Before: DUNIWAY and CHOY, Circuit Judges,
and POOLE,* District Judge

Pador was convicted of murder in the first degree and he appeals.

At the opening of the trial, after some general instructions to the jury, the court said:

> Ladies and Gentlemen of the Jury, at this time Mr. Wagner will make an opening statement; and then I

*The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

must caution you that anything he might say is not to be considered as evidence in the case. The purpose of an opening statement is to tell you what he intends to prove. Mr. Wagner.

Mr. Wagner, the prosecutor, then outlined his case. After describing the killing, he turned to the investigation by the police. Here is part of what he said:

> The police found the address of Mr. Pador from the receptionist and they went over to see Mr. Pador; to see what he had to contribute, what explanation he could make. The police went to the home of Mr. Pador. He admitted his identity. He made certain admissions under certain circumstances, which will be explained to you; as a result of which—and after being warned of his constitutional rights—remained silent. The police then placed him under arrest and took him to Agana Lock-up.

Later in the trial, defense counsel moved for a mistrial, citing these remarks. Denial of the motion, and the remarks themselves, are the sole grounds for appeal. It is claimed that the remarks deprived Pador of due process. Reliance is upon *Doyle v. Ohio*, 1976, 426 U.S. 610, 617-9, and *United States v. Stevens*, 5 Cir., 1976, 538 F.2d 1203, 1205-06. *See also Douglas v. Cupp*, 9 Cir., 1978, ...F.2d ..... (No. 77-1265, July 13, 1978).

Those cases differ from this one. In each, there was testimony that the defendant, when arrested, declined to answer questions. In *Doyle*, the defendant, who took the stand, was vigorously cross-examined on his failure to tell his story when arrested. In the case at bar, on the other hand, there was no evidence at all about Pador's remaining silent. There was no mention whatever of the subject in the pres-

ence of the jury at any time or by anyone after the opening statement. All that we have is the prosecutor's statement, which the jury had been told was not evidence; but only what he expected to prove, plus a failure of proof. The reasonable inference for the jury to have drawn, if it drew any inference, would be that the prosecutor was unable to prove what he said as to Pador's silence.

We need not decide whether the prosecutor's statement falls within *Doyle, Stevens*, or our *Douglas*. Even if it does, we are satisfied, beyond a reasonable doubt, that under the circumstances of this case, the prosecutor's statement was harmless. It was not evidence; the jury was told that it was not evidence. We cannot believe that it contributed anything to Pador's conviction. We have invoked the "harmless beyond a reasonable doubt" rule in a case in which the evidence of the defendant's silence after arrest or when questioned was erroneously received. *United States v. Wycoff*, 9 Cir., 1976, 545 F.2d 679, 682, holding the error harmless. We invoke it here.

Affirmed.

Appendix B

In the District Court of Guam
Territory of Guam

Appellate Division

Criminal Case No. 50-A

James Salazar Pador,
Defendant-Appellant,

vs.

The People of the Territory of Guam,
Plaintiff-Appellee.

[Filed January 24, 1978]

OPINION

Before: DUENAS, SMITH and WONG, District Judges.

PER CURIUM:

Defendant Pador appeals from a conviction of first degree murder entered on December 24, 1974. The sole issue raised on appeal is whether defendant's due process rights were violated when, in his opening statement, the prosecutor made the following reference to Pador's silence at the time of his arrest:

> ". . . The police found the address of Mr. Pador . . . and they went over to see Mr. Pador; to see what he had to contribute, what explanation he could make.

> The police went to the home of Mr. Pador. He admitted his identity. He made certain admissions under certain circumstances, which will be explained to you; as a result of which—and after being warned of his constitutional rights—remained silent. The police then put him under arrest and took him to [the] Agana Lock-up. (Transcript at 17:21).

It is true that a prosecutor may not seek to prove his case by emphasizing the fact that an accused has exercised his Fifth Amendment Rights: either in refusing to take the stand, *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); or in remaining silent in the face of *Miranda* warnings, *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240 (1976). However, the court finds in this case that such a minimal reference to an accused's silence in no way affected the outcome of the case and does not require reversal.

Here, unlike the Supreme Court cases cited above, there was no effort by the prosecution to "solemnize the silence of the accused into evidence against him," (*Griffin,* 380 U.S. 609, 614, 85 S.Ct. 1229, 1233), or to "impeach an explanation subsequently offered at trial," (*Doyle,* 426 U.S. 610, 617-19). A cursory reading of *Chapman, Griffin* and *Doyle, supra,* makes it clear that reversal in these cases was only required where the prosecutor suggested to the jury that failure to take the stand or silence in the face of *Miranda* warnings was indicative of guilt. In *Doyle,* the prosecution in an effort to impeach defendants' testimony that they had been framed belabored the fact that they refused to answer questions after being read their rights:

> *"We have the Fifth Amendment.* I agree with it. It is fundamental to our sense and system of fairness, but *if you are innocent—*
>
> . . . .
>
> "(continuing)—*if you are innocent*—Ladies and Gentlemen, if you have been framed, if you have been set-on, etc. etc. etc., as we heard in Court these last days, you don't say, when the law enforcement officer says,—'You are under arrest,'—*you don't say,*—'I don't know what you are talking about.' *You tell the truth.* You tell them what happened and you go from there. *You don't say,—'I don't know what you are talking about,'—and demand to see your lawyer and refuse to permit a search of your vehicle, forcing the law enforcement agents to get a search warrant.*
>
> *"If you're innocent, you just don't do it. Doyle Tr. 515-516, 519, 526."* (426 U.S. 634-36; emphasis supplied).

Here the prosecution's opening statement did not suggest to the jury one way or another that the accused was guilty when he remained silent. The silence of the accused was in no way used to impeach him or to buttress the government's case; therefore, we do not have a *Doyle* type violation here. The reference to the accused's silence after being read his rights could not have been taken by the jury as a negative comment on his silence and did not affect the verdict. While the defendant has suggested an emerging rule from other jurisdictions that any "Doyle-type" violation can never be harmless, we choose to accept the rule of the Ninth Circuit that has been established regarding the prosecution's comments on a defendant's exercise of his Fifth Amendment Right not to testify. The rule has been generally stated as follows:

> "The test is whether the language used was *manifestly* intended or was of such character that the jury would *naturally* and *necessarily* have taken it to be a comment on the failure of the accused to testify. *Hayes v. United States*, 368 F.2d 814, 816 (9th Circuit 1966); *Brown v. United States*, 370 F.2d 874, 876 (9th Circuit 1966), cert. denied, 386 U.S. 1039, 87 S.Ct. 1494, 18 L.Ed2d 605 (1967)." (Emphasis supplied).

Here, we find that the prosecutor's reference to defendant Pador's silence was not intended to raise, nor did it raise, in the jury's mind a negative inference regarding the exercise of his Fifth Amendment Rights.

AFFIRMED.

CRISTOBAL C. DUENAS
CRISTOBAL C. DUENAS

RUSSELL E. SMITH
RUSSELL E. SMITH

DICK YIN WONG
DICK YIN WONG

Supreme Court, U. S.
FILED
FEB 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1067

JAMES S. PADOR,
Petitioner,

vs.

THE PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

1. Does a reference in prosecutor's opening statement to defendant's silence after Miranda warnings, without more, require automatic reversal of the conviction where in fact defendant did not remain silent but made a statement which was suppressed?

STATEMENT OF THE CASE

At the outset of the trial the Court said to the Jury:

> THE COURT: Ladies and Gentlemen of the Jury, at this time Mr. Wagner will make an opening statement; and then I must caution you that anything he might say is not to be considered as evidence in the case. The purpose of an opening statement is to tell you what he intends to prove.
>
> (Transcript at 17)

Mr. Wagner restated this to the jury before beginning his outline of the facts he intended to prove. (Transcript at 17.)

His opening statement covered ten pages in the transcript. About midway through his presentation Mr. Wagner made the reference which is the subject of this petition:

> ". . . The police found the address of Mr. Pador . . . and they went over to see Mr. Pador; to see what he had to contribute, what explanation he could make. The police went to the home of Mr. Pador. He admitted his identity. He made certain admissions under certain circumstances, which will be explained to you; as a result of which—and after being warned of his constitutional rights—remained silent. The police then placed him under arrest and took him to (the) Agana Lock-up."
>
> (Transcript at 21)

No further mention of silence whatsoever was made by Mr. Wagner. As a matter of fact Pador did not remain silent. Detective J. Q. Acfalle testified Pador was given his rights. Defense counsel's objections prevented him from relating what Pador said. He did testify that Pador did say something. (Transcript at 174, lines 22, 23.)

Thereafter the Jury was excused and hearing was had on defendant's motion to suppress. The motion was granted as to the statement made after defendant received the *Miranda* warnings which the Court held to be constitutionally insufficient.

REASONS FOR DENYING THE WRIT

1. THIS COURT HAS HELD COMMENTS BY A PROSECUTOR OR COURT ON A DEFENDANT'S FAILURE TO TAKE THE STAND DOES NOT AUTOMATICALLY REQUIRE REVERSAL BUT ARE TO BE CONSIDERED IN THE LIGHT OF THE DOCTRINE OF HARMLESS ERROR.

This rule was established in *Chapman v. California,* 386 U.S. 23, 87 S.Ct. 824 (1967) where, under the facts, there was no doubt the error was harmful. In making it clear that some constitutional error can be harmless the Court said at page 827:

> [4] We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very

useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed that result of the trial. *We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.* (Footnotes omitted, emphasis added.)

In the instant case, the prosecutor's reference in his opening statement to post *Miranda* warning silence of Pador was harmless error beyond a reasonable doubt.

Prejudicial error, when a defendant's Fifth Amendment right against self incrimination is violated, occurs when his silence is used against him. The cases so holding involve use of the silence either in the presentation of evidence or comment in argument. The purpose is to give the jury an opportunity to draw an inference unfavorable to defendant.

In *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965) the Court held comment by the prosecutor or instructions by the Court that defendant's silence is evidence of guilt, is unconstitutional. In this case the California Constitution permitted comment. The Court said at page 1232:

> "... It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976) held the use of defendant's silence for impeachment purposes, under the circumstances of that case, unconstitutional. This case did not hold every such use unconstitutional regardless of whether or not it prejudiced the accused as petitioner suggests.

The Court said at page 2245:

> "The State has not claimed that such use in the circumstances of this case might have been harmless error."

The Court thus leaves the way open to raise the issue of harmless error in an appropriate case. It did not say the issue would not have been considered had it been raised.

All the cases cited by defendant deal with the use of silence as evidence at the trial, in closing argument or both, by the prosecutor. None deals with the situation we have here, a mention of silence in the opening statement with no attempt by the prosecutor to draw from this an inference of guilt.

2. THE DECISIONS OF THE FLORIDA SUPREME COURT REFUSING TO RECOGNIZE AND APPLY THE CHAPMAN DOCTRINE OF HARMLESS ERROR ARE NOT CONTROLLING ON THIS COURT AND SUCH CONFLICT IS NOT A PROPER GROUND FOR GRANTING THE WRIT.

In *Thomas v. State* (Fla. App.) 342 So.2d 991 (1977) the Court said:

> *"The principle of law is now established that any comment upon an accused's exercise of his right to*

> *remain silent is reversible error without regard to the harmless error doctrine.* Bennett v. State, 316 So.2d 41 (Fla. 1975); Shannon v. State, 335 So.2d 5 (Fla. 1976). This legal principle has recently been interpreted to the point where it is now considered a deprivation of due process to allow the accused's silence at the time of arrest to be used to impeach the accused's explanation subsequently offered at trial. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976); Davis v. State, 342 So.2d 987 (Fla. 3d DCA, released this same day)." (Emphasis added)

This may be the law in Florida but this case is not good authority in any other jurisdiction. The reliance on *Doyle* for this proposition is misplaced as has been seen. It is significant that the constitutional errors in the Florida cases would most probably be held not harmless beyond a reasonable doubt but the issue was neither raised nor discussed. The Court simply stated the rule as a foregone conclusion.

Before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California,* supra. In enunciating this rule the Court set the standard for applying the rule that judgments shall not be reversed for errors or defects which do not affect the substantial rights of the parties. The Court says at 87 S.Ct. 827:

> ". . . None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude

> that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, constistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

Decisions of the United States Supreme Court are the ultimate authority as to matters involving the application of the Constitution. Since such decisions are binding on the states, it follows that the Florida decisions in conflict with *Chapman* cannot be used as authority to grant a writ in this case.

3. THE NINTH CIRCUIT'S HOLDING "BEYOND A REASONABLE DOUBT, THAT UNDER THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S STATEMENT WAS HARMLESS" IS CLEARLY CORRECT.

This case involved the rivalry of Pador and one Paoule, the victim, for the affections of a Korean girl, Song Cha DeWitt.

While Pador and Song Cha were at the Surf Club on the night of the crime, Paoule came in, had a brief conversation with her and left. Later Pador took the girl home in his car. While in the car Pador loaded his gun saying someone was going to get killed.

When they arrived at the Polynesian Apartments, Paoule was there. There was a struggle between him and Pador. Pador left the fight, went to his car, got the loaded gun, came back and shot and killed Paoule.

When the police went to Pador's house he said he was waiting for the complaint and would surrender. This was the statement which was admitted into evidence at the suppression hearing and referred to in the opening statement of the prosecutor as "certain admissions".

It is difficult to understand what Mr. Wagner meant by the reference to silence in his opening statement. It was not intended as a comment on defendant's failure to make a statement after being given *Miranda* warnings. At the trial the jury learned defendant did make a statement which was suppressed. Nor was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *Hayes v. United States,* 368 F.2d 814 (9th Cir. 1966); *Brown v. United States,* 370 F.2d 876 (9th Cir. 1966), cert. denied, 386 U.S. 1039, 87 S.Ct. 1494 (1967).

Defense counsel did not naturally and necessarily take this as such comment. Otherwise there would have been an immediate objection. It was only after reading the transcript that defense counsel saw this as a possible ground for a motion for mistrial. The jury did not have these words repeated to them in written form. It is not possible that they could have considered this as evidence of guilt which influenced their verdict.

They based their verdict solely on the evidence, which was overwhelming, not upon an inference, which was not even drawn by defense counsel until he saw the statement in writing several days after it was made.

CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated this 16th day of January, 1979.

Respectfully submitted,

NANCY NYE
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